97-943 (3)

No. 97-

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In The Supreme Court of the United States

OCTOBER TERM 1997

CONRADO LOZANO,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the First Judicial Circuit of Texas

REPLY BRIEF OF PETITIONER CONRADO LOZANO

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Petitioner, Conrado Lozano ["Mr. Lozano"], for his brief, pursuant to Rule 15(6) of the Supreme Court Rules, in reply to the brief in opposition of respondent the Atchison, Topeka and Santa Fe Railway Company ["Santa Fe"], states as follows:

I.

Santa Fe's discussion of whether the Texas trial court erred is irrelevant; the court of appeals assumed there was error; it would not, however, follow federal law and decide the merits of the issues presented

Santa Fe spends the better part of its opposition discussing whether the Texas trial court erred in failing to give Mr. Lozano's instruction on assumption of the risk. See Santa Fe's brief in opposition at 4-12.[1] This entire discussion is irrelevant to the merits of Mr. Lozano's writ petition.

The court of appeals did not question whether the trial court erred in failing to give the instruction on any basis much less on any of the bases discussed by Santa Fe. To the contrary, the court of appeals assumed, without deciding, that the trial court erred in failing to give the instruction: "Assuming without deciding that the trial court erred in refusing Mr. Lozano's requested instruction, Lozano has not brought a sufficient record before this Court to show that the error harmed him." See the court of appeals' opinion at 3

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[1] Santa Fe's discussion breaks down into sub-questions of whether assumption of the risk was raised at trial, whether the instruction was necessary, whether the trial court had to give the instruction and whether the instruction was substantially correct. Ibid.

(emphasis added).[2] The net effect of the court of appeals' assumption of error is: assumption of the risk was raised at trial; the FELA[3] assumption of the risk instruction was required as a matter of law; Mr. Lozano's instruction was substantially correct, and the trial court erred in refusing it. Trial court "error" is not the real issue here.

What is in issue is the court of appeals' refusal to meet the merits of Mr. Lozano's appeal on the basis of the Texas harmless error rule. We contend that the Supreme Court's opinion in Liepelt foreclosed that option; instead, the court of appeals was required, under federal law, to determine reversible error on a per se basis given the trial court's refusal to give the FELA required instruction. See Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 492-3, 498 (1980)

The state-federal conflict here is easily stated. The court of appeals, relying on Texas appellate standards (the harmless error rule), says it assumes trial court error under the FELA but refuses Mr. Lozano his federal remedy of per se reversal. Liepelt sets out a different, conflicting standard: under Liepelt, Texas procedural law does not apply; federal law does, and federal law does not look to harmless error as Texas law would but rather to the question of error as a

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[2] The court of appeals' opinion is reprinted in its entirety as Appendix B to Mr. Lozano's writ petition. For the quoted material, see Appendix B at 12a.

[3] See the Federal Employers Liability Act, 45 U.S.C. §§51 et seq. For discussion of the requirement of the instruction under the FELA, see Mr. Lozano's writ petition at 3-4.

matter of law; that is: if the FELA instruction was required, it was reversible error without more for the trial court to refuse to give it. Id., 444 U.S. at 498.

Though the FELA instruction in Liepelt was a different mandatory instruction, the operant principle in Liepelt should generally control here because the Supreme Court set out a general federal rule applying to any case involving state court review of a trial court's failure to give a mandatory FELA instruction. Ibid. Because a mandatory instruction was required here, the court of appeals erred in failing to decide the issue, reverse the trial court's judgment and remand this case for a new trial. See Liepelt, 444 U.S. at 498.

II.

The only thing relevant in Santa Fe's opposition is its discussion of the would-be controlling nature of the Texas harmless error rule--which does nothing more than underscore the merits of Mr. Lozano's writ petition

The only relevant portion of Santa Fe's opposition is its wooden invocation of the Texas harmless error rule as somehow trumping the controlling federal standard of appellate review set out in Liepelt. See Santa Fe's brief in opposition at 13-4. Wrongfully assuming the validity of this erroneous conclusion, Santa Fe's position is, state, not federal rules control here. That's just wrong. As the Supreme Court noted in Liepelt, "whether it was error to refuse that instruction [under the FELA] . . . is a matter governed by federal law." Id., 444 U.S. at 492-3.

There was no limitation of Liepelt's reach and effect to simply one genus of FELA instruction. Moreover, there would be no reason why the Supreme Court would have done so; such a result would foreseeably lead to nothing but inconsistent and illogical results in FELA instruction cases based on which mandatory instruction was at issue. This would be plainly unconstitutional: if a party to an FELA case has a federal right to a mandatory FELA instruction, which mandatory instruction is at issue should be irrelevant to resolution of the controversy. What should control is the principle that a mandatory FELA instruction is generically a substantive right the denial of which is remediable as per se reversible error on appeal. Liepelt, 444 U.S. at 498.

III.

A comment on Santa Fe's misstatement of the record concerning the existence of the assumption of the risk issue and the propriety of Mr. Lozano's requested instruction

As noted, the court of appeals assumed error on the part of the trial court; hence, Santa Fe's discussion of, and mischaracterization of, whether assumption of the risk was in the case and whether Mr. Lozano's requested instruction was substantially correct is irrelevant. That point aside, because Santa Fe's discussion on these issues is a material misstatement of the record, we comment on it briefly.

There is no question Santa Fe knew full well that assumption of the risk was alive in this case; it discussed it candidly in a trial brief, denominated simply "ASSUMPTION OF THE RISK". There, Santa Fe tells us that the very same evidence that Mr. Lozano sought to limine out under the assumption of the risk doctrine was going to be

used by Santa Fe "as proof of contributory negligence." Appendix A at 1a-2a. Santa Fe rationalizes that this evidence must nevertheless go to the jury because, "Plaintiff's contributory negligence cannot be denied just because Defendant's evidence proving contributory negligence may also prove assumption of the risk [citation omitted]." Appendix A at 2a (emphasis added).

Santa Fe did what it said it was going to do; it offered and made comment on evidence that could reasonably lead jurors to conclude assumption of the risk was the cause in question during its deliberation on whether Mr. Lozano was contributorily negligent.[4] That is precisely the situation that gives rise to the mandatory FELA instruction on assumption of the risk. See Jenkins v. Union Pacific R. Co., 22 F.3d 206, 212 (9th Cir. 1994); Koshorek v. Pennsylvania R. Co., 318 F.2d 364, 369-71 (3rd Cir. 1963); Hamrock v. Consolidated Rail Corp., 155 Ill.App.3d 55, 501 N.E.2d 1274, 1279-80 (Ill.App. 1986). By Santa Fe's own description of the evidence and proof, the instruction was required here; the trial court erred in not giving it. For further discussion, see Mr. Lozano's writ petition at 2-5.

Next, Mr. Lozano's proposed instruction was, contrary to the suggestion of Santa Fe, "substantially correct." There is no federal form FELA instruction on assumption of the risk. The instruction used by Mr. Lozano was, however, straight out of the Supreme Court's opinion in Stone v. New York C., & St. L.R. Co., 344 U.S. 407, 409 (1953). There, the Supreme Court said, in regard to the

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[4] See, infra, at 6-7, for the discussion at the charge conference as to Santa Fe's raising of assumption of the risk during trial.

nonapplicability of assumption of the risk in an FELA case, "the fact that the employee commanded to do the act that caused the injury, first protested does not place the risk of injury on him." Ibid. That's literally what Mr. Lozano proposed to the Texas trial court as his instruction. A copy of Mr. Lozano's instruction is included with this reply as Appendix B.[5]

Stone is still good law. The Supreme Court's terse, generic statement of the inapplicability of assumption of the risk set out there is more than adequate as an instruction. Santa Fe did not even brief Stone, much less offer any authority as to why it would not create the relevant instruction standard in this case. Mr. Lozano's reliance on Stone was entirely appropriate; the instruction was fine as submitted.

We don't have to wonder whether Mr. Lozano informed the Texas trial court of Stone; the case was presented to the trial court during the charge conference and, we believe, went largely ignored by the Texas trial court as is evidenced by the following exchange between Mr. Lozano and the judge:

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[5] Appendix B contains on its face the citation to Stone and a second Supreme Court case, Blair v. Baltimore & Ohio Railway Co., 323 U.S. 600 (1945). These citations were in the original proposed instruction; we, however, failed to include the citations, through oversight, in transcribing the instruction in our writ petition.

MR. HAAG [counsel for Mr. Lozano]:

> There has been a whole lot on the part of defense lawyers talking about risk, hazard, danger, and my client, Mr. Lozano knew there was risk involved and its kind of like he accepted the risk.
>
> That's why I think this instruction that says "If the employee protests, but then performs the commanded task, the risk of injury does not shift to him."
>
> I have my cite there Stone v. New York C.&St. L.R. Co., 344 U.S. 407.
>
> Blair v. Baltimore and Ohio Railway Co., 323 U.S. 600 and other cites with it.

THE COURT:

> Plaintiff's proposed instruction on assumption of the risk is refused.

Volume III, trial statement of facts of March 28, 1995, at 325-6, a copy of these excerpted pages from the statement of facts is included as Appendix C here. See Appendix C at 5a.

Curiously, while Santa Fe argues here long and hard about the propriety of Mr. Lozano's instruction, it had nary a word to say about it at trial. See Appendix C at 6a.

IV.

Conclusion

For the reasons stated in Mr. Lozano's writ petition, there is good cause for the Supreme Court to grant Mr. Lozano's writ. Santa Fe's brief in opposition offers very little in the way of relevant response to the writ petition and what it does say does nothing more than underscore the need for the granting of this writ to ensure that controlling federal precedent will be followed in the Texas state courts on issues where federal law, not state law, controls appellate review.

Respectfully submitted,

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APPENDIX

APPENDIX A

CAUSE NO. 93-14480

CONRADO LOZANO, Plaintiff
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Defendants

In the 152nd Judicial District Court
of Harris County, Texas

ASSUMPTION OF THE RISK

Assumption of the risk has been abolished not only in F.E.L.A. cases but in all negligence cases. LOZANO would seek to limine out all evidence of his own conduct arguing that it is all "assumption of the risk."

THE FACTS

LOZANO claims injury after he stumbled because a Jim Crow jack detached from the rail. The Railway Company denies the jack was defective and LOZANO contends it was defective. The Railway Company will offer

evidence that when using this or any other hand tool, it is important to assume a safe stance and position so that you are balanced. Other witnesses will testify that When using any jack (including a Jim Crow jack) or lining bar or pry bar or claw bar, you must be prepared for slipping so that you will not lose your balance or be injured. The Santa Fe Safety Rules require that hand tools be used defensively. Rule 3002 states: "Tools must be used defensively so that slipping or unexpected movement will not cause loss of balance or injury.

This type of evidence is clearly admissible as proof of contributory negligence.

Violation of a Safety or Operating Rule that is sufficiently specific is evidence of contributory negligence. Louisville N.R. Co. v. Parker, 138 S.W. 231 (Ala. 1931), cert dis'm. 53 S.Ct. 93 (1932); AT&SF Railway Company v. Ballard, 105 F.2d 768 (5th Cir. 1940), cert denied 60

S.Ct. 1096 (1940); Flanigan v. Burlington Northern, Inc., 632 F.2d 88 (8th Cir. 1980).

Assumption of the risk is not a defense under the F.E.L.A. but the defense of the Plaintiff's contributory negligence cannot be denied just because the Defendant's evidence proving contributory negligence may also prove assumption of the risk. Beanland v. Chicago Rock Island and Pacific Railroad Co., 480 F.2d 109 (8th Cir. 1973).

An instruction advising that assumption of the risk is not a defense in F.E.L.A. cases should generally not be submitted to a jury. Casko v. Elgin, Joliet & Eastern Railway Co., 361 F.2d 748 (7th Cir. 1966); Heater v. Chesapeake & Ohio Railway Co., 497 F.2d 1243 (7th Cir.

1974); Clark v. Burlington Northern, 726 F.2d 448 (8th Cir. 1984).

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 1995, I served the above and foregoing Assumption of the Risk by hand delivery to opposing counsel.

/s/
Douglas W. Poole

APPENDIX B

Instruction No. _____

If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

/s/ "3/29/95
Refused
Harriet O'Neill"
Judge Presiding

Stone v. New York C.&St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed 331 (1953);
Blair v. Baltimore & O.Ry., Co., 323 U.S. 600, 605, 65 S.Ct. 545, 89 L.Ed. 490 (1945).

APPENDIX C

MR. HAAG: There has been at [sic] whole lot on the part of the defense lawyers talking about risk, hazard, danger, and my client, Mr. Lozano knew there was risk involved and it is kind of like he accepted the risk.

That's why I think this instruction that says "If the employee protests, but then performs the commanded task, the risk of injury does not shift to him."

I have my cite there Stone v. New York C. & St. L.R. Company, 344 U.S. 407.

Blair v. Baltimore & Ohio Railway Company, 323 U.S. 600, and other cites} [sic] with it.

THE COURT: Plaintiff's proposed instruction on assumption of the risk is refused.